88-796

No. _____

Supreme Court, U.S.
FILED
NOV 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

Tommy McIntosh, Charles Marvin Hayes,
and Maurice Crawford,

Petitioners

v.

State of Arkansas,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

JOHN WESLEY HALL, JR.*
AND CRAIG LAMBERT
523 West Third Street
Little Rock, Arkansas 72201
(501) 371-9131

Attorneys for Petitioners

*Counsel of Record

TREVATHAN PRESS • LITTLE ROCK

QUESTIONS PRESENTED FOR REVIEW

I.

THE DECISION BELOW, HOLDING THAT A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL MAY NOT BE RAISED FOR THE FIRST TIME ON APPEAL, EVEN WHEN THE ISSUE IS APPARENT ON THE FACE OF THE RECORD, IS CONTRARY TO THE DECISION OF THIS COURT IN *WOOD V. GEORGIA.*

II.

WHETHER REASONABLE SUSPICION IS A NECESSARY PREREQUISITE BEFORE AN OFFICER MAY REQUEST A CONSENT TO SEARCH A VEHICLE IN AN INHERENTLY COERCIVE ROADSIDE ENCOUNTER IS AN IMPORTANT QUESTION THAT NEEDS TO BE DECIDED BY THIS COURT; THE ARKANSAS SUPREME COURT'S DECISION ON THIS POINT IS CONTRARY TO THE DECISIONS OF OTHER STATE AND FEDERAL COURTS.

III.

THE QUESTION OF WHETHER THE FOURTH AMENDMENT'S PROHIBITION OF THE USE OF IMPLIED COERCION IS VIOLATED BY THE LANGUAGE CONTAINED IN CONSENT FORMS SUCH AS THE ARKANSAS STATE POLICE CONSENT TO SEARCH FORM IS AN ISSUE THAT HAS NEVER BEEN ADDRESSED BY THIS COURT AND IS AN IMPORTANT ISSUE THAT SHOULD BE DECIDED BY THIS COURT TO CLARIFY THE LAW OF WHEN THE BOUNDS OF IMPLIED COERCION HAVE BEEN CROSSED.

IV.

THIS COURT SHOULD ADDRESS THE QUESTION, LEFT OPEN IN *GREER V. MILLER*, 107 S.CT. 3102 (1987), OF WHETHER A DEFENDANT'S FIFTH AMENDMENT RIGHT TO REMAIN SILENT IS VIOLATED UNDER *DOYLE V. OHIO*, 426 U.S. 610 (1976), WHEN THE JURY IS ALLOWED TO CONSIDER A STATE WITNESS' COMMENT BRINGING ATTENTION TO THE ACCUSED'S POST-ARREST SILENCE, EVEN THOUGH DEFENSE COUNSEL'S OBJECTION IS SUSTAINED.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES v
OPINION BELOW 1
JURISDICTION 2
CONSTITUTIONAL PROVISIONS INVOLVED . . 2
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 7

I. The decision below, holding that a claim of ineffective assistance of counsel may not be raised for the first time on appeal, is contrary to the decision of this Court in *Wood v. Georgia* when the issue is apparent on the face of the record 7

II. Whether reasonable suspicion is a necessary prerequisite before an officer may request a consent to search a vehicle in an inherently coercive roadside encounter is an important question that needs to be decided by this Court; the Arkansas Supreme Court's decision on this point is contrary to the decisions of other state and federal courts 8

III. The question of whether the Fourth Amendment's prohibition of the use of implied coercion is violated by the language

contained in consent forms such as the Arkansas State Police consent to search form is an issue that has never been addressed by this Court and is an important issue that could be decided by this Court to clarify the law of when the bounds of implied coercion have been crossed 11

IV. This Court should address the question left open in *Greer v. Miller*, 107 S.Ct. 3102 (1987), of whether a defendant's Fifth Amendment right to remain silent is violated under *Doyle v. Ohio*, 426 U.S. 610 (1976), when the jury is allowed to consider a state witness' comment bringing attention to the accused's post-arrest silence, even though defense counsel's objection is sustained 13

CONCLUSION 16

APPENDIX

Affirmance of the Judgment of Conviction: *McIntosh et al v. State*, Ark. S.Ct. CR 88-10 (July 11, 1988) A1

Denial of Rehearing: *McIntosh et al v. State*, Ark. S.Ct. CR 88-10 (Sept. 12, 1988) A8

Denial of Motion to Recall Mandate Pending Review by the United States Supreme Court: *McIntosh et al. v. State*, Ark. S.Ct. CR 88-10 (October 17, 1988) A8

TABLE OF AUTHORITIES

Cases

Amos v. United States, 255 U.S. 313 (1921) . . . 13
Bumper v. North Carolina, 391 U.S. 543 (1968) . . . 13
Florida v. Royer, 460 U.S. 491 (1983) 10, 11
Garrett v. Goodwin, 569 F.Supp. 106
(E.D.Ark. 1982) 5, 9, 10
Greer v. Miller, 107 S.Ct. 3102 (1987) 6, 13, 14, 15
McIntosh v. State,
296 Ark. 167, 753 S.W.2d 273 (1988) 1, 5
Meadows v. State, 269 Ark. 380,
602 S.W.2d 636 (1980) 9, 10
Nakanoto v. Fasi, 635 P.2d 946 (Hawaii 1981) 9
Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 10
Terry v. Ohio, 392 U.S. 1 (1968) 11
Wood v. Georgia, 450 U.S. 261 (1981) 7, 8

Constitutional Provisions:

Fourth Amendment 2, 9, 12
Fifth Amendment 2, 15
Sixth Amendment 3
Fourteenth Amendment, § 1 3

Statutes:

28 U.S.C. § 1257(3) 2

IN THE

Supreme Court of the United States

Tommy McIntosh, Charles Marvin Hayes,
and Maurice Crawford,

Petitioners

v.

State of Arkansas,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

OPINION BELOW

The opinion of the Arkansas Supreme Court is reported at *McIntosh v. State*, 296 Ark. 167, 753 S.W.2d 273 (1988). On September 12, 1988, the Arkansas Supreme Court denied petitioners' Petition for

Rehearing, and on October 17, 1988, the court, with one justice dissenting, denied petitioners' motion to recall the mandate pending this petition for writ of certiorari.

JURISDICTION

The Arkansas Supreme Court decided this case on July 11, 1988 and rehearing was denied on September 12, 1988. Petitioners' motion to recall the mandate was denied on October 17, 1988.

This Court has jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the U.S. Constitution provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, ...

The Sixth Amendment to the U.S. Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the U.S. Constitution, § 1, provides in pertinent part:

> . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law; . . . .

STATEMENT OF THE CASE

On February 8, 1987, petitioners were stopped on I-40 near Ozark, Arkansas, by Arkansas State Trooper David Hyden for speeding. Hyden approached the van and determined that the odometer showed approximately 5,000 miles. Hyden had the driver, petitioner McIntosh, to come back to his patrol unit. McIntosh provided Hyden with his driver's license and the rental agreement for the van as evidence of registration. Hyden noticed that the rental agreement

showed that the van had 1,500 miles on it when rented. Hyden asked McIntosh where they had been, and McIntosh replied that they had been to Oklahoma. Hyden asked for consent to search from McIntosh and obtained a written consent from him using the standard Arkansas Police consent form. The reason he asked for consent to search was because the mileage on the van indicated to him that the van had been driven farther than McIntosh had told him it had, and because McIntosh appeared nervous.

The search of the van yielded a quantity of cocaine which was found in a plastic shopping bag in the rear of the van, and Petitioners were charged with possession of cocaine with intent to deliver.

The evidence at trial showed that McIntosh was the driver, Crawford was seated in the passenger seat, and Hayes was seated in the back seat of the van. Only Crawford's fingerprints were found on the bag containing the cocaine.

A second search of the van, conducted at Arkansas State Police Headquarters, revealed several motel receipts from California. All three petitioners had stated while at the Arkansas State Police Headquarters that they had not been to California. Two lawfully possessed guns were also recovered in the searches of the van.

Petitioners moved to suppress the evidence seized

from the van on the basis that the consent obtained was not voluntary or obtained from the person authorized to give consent. This motion was denied.

All three petitioners were represented at trial by a single defense attorney.

At trial, during the State's direct examination of Arkansas State Trooper Dale Best, Best testified that while in custody at State Police Headquarters and after he read petitioners their Miranda rights, petitioners "made no comment" in response to a question as to whether or not they had been to California. Defense counsel immediately moved for a mistrial. The trial court denied the motion but offered to admonish the jury to disregard the testimony, which offer counsel refused. The jury was thus permitted to consider, for any purpose it chose, Best's testimony that petitioners had invoked their right to remain silent.

On appeal, the Arkansas Supreme Court rejected petitioners' argument that reasonable suspicion is required before a police officer may request a consent to search. The court reasoned that the case cited by petitioners, *Garrett v. Goodwin*, 569 F.Supp. 106 (E.D. Ark. 1982), only requires that reasonable suspicion exist in roadblock situations. The court also refused to impose a requirement of reasonable suspicion because the principle "has never been declared to be the law by the United States Supreme Court." *McIntosh*, 296 Ark. at

167, 753 S.W.2d at 275.

The court also apparently found no merit in petitioners' claims that consent to search obtained through the use of the Arkansas State Police consent to search form is invalid as the result of coercion; however, no discussion of this point appears in the opinion.

The court further rejected petitioners' claim that a mistrial was required because of Best's comment on petitioners' invocation of their right to remain silent. The court reasoned that the recent case of *Greer v. Miller*, 107 S.Ct. 3102 (1987), was dispositive of the issue.

Finally, the court refused to consider petitioners' claim that their counsel was ineffective because of a conflict of interest in representing all three, holding that under Arkansas law a claim of ineffective assistance of counsel may not be raised for the first time on appeal. Here, the trial record shows counsel's conflict of interest.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW, HOLDING THAT A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL MAY NOT BE RAISED FOR THE FIRST TIME ON APPEAL, EVEN WHEN THE ISSUE IS APPARENT ON THE FACE OF THE RECORD, IS CONTRARY TO THE DECISION OF THIS COURT IN *WOOD V. GEORGIA.*

In *Wood v. Georgia*, 450 U.S. 261 (1981), this Court held that where a possible denial of counsel and due process violation is apparent on the particular facts of a case, an appellate court is empowered to address the issue even if it is not raised below. Like the present case, Wood was a conflict of interest situation. This Court pointed out, *id.* at 265 n. 5, that the fact that a claim of conflict of interest is not raised below demonstrates why it is appropriate to consider it on appeal: it is highly unlikely that counsel below is going to concede that he is ineffective or that he acted improperly as counsel because of a conflict of interest. "We cannot assume that [the petitioners], on their own initiative, were capable of protecting their interests." *Id.*

This trial was marked by defense counsel lamely trying to convince the jury that the petitioners had a cruel hoax played on them in that the drugs found in the van were planted there to make them unwilling couriers.

Independent defense counsel, however, would have tried this case differently. Two of these petitioners likely could have escaped conviction if they were represented by separate counsel by vigorous cross-examination, and independent advice on how to testify on their own behalf. Regretfully, allegiance to one petitioner sacrificed independent advice to the others, and all three were convicted.

The Arkansas Supreme Court, in rejecting petitioners' claim of ineffective assistance of counsel, refused to even consider *Wood* or the rationale behind this Court's decision there. In effect, the result of the court's decision is that defense counsel must allege that he is ineffective at trial in order to preserve the issue for appeal. Otherwise, the defendant is relegated to the state and federal post-conviction procedures that are available, at great expense of time, money, and loss of liberty,

The decision below is thus directly contrary to the reasoning of *Wood*. This Court should grant the writ.

II.

WHETHER REASONABLE SUSPICION IS A NECESSARY PREREQUISITE BEFORE AN OFFICER MAY REQUEST A CONSENT TO SEARCH A VEHICLE IN AN INHERENTLY COERCIVE ROADSIDE ENCOUNTER IS AN IMPORTANT QUESTION THAT NEEDS TO BE

DECIDED BY THIS COURT, AND THE ARKANSAS SUPREME COURT'S DECISION ON THIS POINT IS CONTRARY TO THE DECISIONS OF OTHER STATE AND FEDERAL COURTS.

This Court has never addressed the question of whether, in a roadside stop situation, a law enforcement officer must have reasonable or articulable suspicion before the Fourth Amendment permits him to request a consent to search a vehicle. Apparently, few courts at all have had occasion to address the issue, but those that have have concluded that such a requirement exists.

In *Garrett v. Goodwin*, 569 F.Supp. 106 (E.D. Ark. 1982), the United States District Court for the Eastern District of Arkansas approved and adopted a consent decree entered into between plaintiffs in that case and the Arkansas State Police. The decree held, *inter alia*, that the Fourth Amendment requires that "the police cannot request a consent to search without a reasonable or articulable suspicion to believe that there is contraband or criminal evidence where the police propose to look." *Id.* at 121. In adopting this rule of law, the court relied upon *Nakamoto v. Fasi*, 635 P.2d 946 (Hawaii 1981), and *Meadows v. State*, 269 Ark. 380, 602 S.W.2d 636, 638 (1980). In *Meadows*, the Arkansas Supreme Court stated:"To sum it up, if the officer's conduct in this case is proper, then any law enforcement officer may stop a citizen at any time, without reasonable grounds for suspicion, request identification, and arrest

and search the citizen if his identity uncovers an outstanding felony warrant." 269 Ark. at 382, 602 S.W.2d at 638. The court's ultimate holding in *Meadows* was that it is unconstitutional to stop a citizen and ask for his identification on bare suspicion.

The rule announced in *Garrett* requiring reasonable suspicion is not inconsistent with the landmark decision of *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). In *Schneckloth*, this Court implicitly held that probable cause is not required in order to request consent, reasoning that if probable cause exists, and the automobile exception to the warrant requirement otherwise applies, there is no need to request consent. *Id.* at 228. However, the Court left open the possibility that a lesser standard of suspicion may be required. The court stated:

> In situations where the police have *some evidence* of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence.

Id. at 228 (emphasis added). Thus, it can reasonably be inferred that this Court would require that the police at least have "some evidence" before a request for consent is justified.

The Court's holding in *Florida v. Royer*, 460 U.S. 491

(1983), and *Terry v. Ohio*, 392 U.S. 1 (1968), also lend support for a rule requiring reasonable suspicion to seek consent. *Royer*, which held that consent obtained as the product of an illegal detention is invalid, demonstrates that there are limits upon when the police may ask for consent, and that it violates the Fourth Amendment to do so after a de facto arrest made without probable cause. *Terry*, which held that an officer may not conduct even a limited pat down search absent reasonable suspicion, shows that when the police propose to make even a minimal invasion of the privacy of a citizen, there must be some level of justification. All of these cases together show the incorrectness of the overused phrase, "It never hurts to ask," because the act of asking is itself an intrusion. And, in order to ask, the officer must also detain. Even if these are only minimal intrusions, they should still be governed by some standard of justification.

The Arkansas Supreme Court's reason for refusing to adopt a rule of law on this issue shows why this Court should consider the issue. Additionally, the few courts that have addressed the question have held contrary to the Arkansas Supreme Court. Granting review on this issue will enable the Court to clarify the law in an area where the Court has not spoken before.

III.

THE QUESTION OF WHETHER THE FOURTH AMENDMENT'S PROHIBITION OF THE

USE OF IMPLIED COERCION IS VIOLATED BY THE LANGUAGE CONTAINED IN CONSENT FORMS SUCH AS THE ARKANSAS STATE POLICE CONSENT TO SEARCH FORM IS AN ISSUE THAT HAS NEVER BEEN ADDRESSED BY THIS COURT AND IS AN IMPORTANT ISSUE THAT SHOULD BE DECIDED BY THIS COURT TO CLARIFY THE LAW OF WHEN THE BOUNDS OF IMPLIED COERCION HAVE BEEN CROSSED.

The very first line of Arkansas State Police consent search form utilized in the present case provides: "In order to cooperate in an investigation being conducted by the Arkansas State Police . . ." What investigation? Petitioners in this case were reasonably suspected of absolutely nothing. The tenor of this opening line is, assuming no other words were said, "you're in trouble, and you better cooperate for your own good." Why else would the State Police have to tell a person allegedly freely consenting why he should consent? The language contained in the form implies that if one does not consent to the search, bad things may happen to him. This is pure implied coercion. The fact that the police are telling a person from whom they wish to obtain a consent that an investigation is under way is an admission by the police that the motorist must believe he is being detained for something.

The law is universal that a consent to search is not voluntary under the Fourth Amendment if there has

been implied coercion in obtaining the consent. *Amos v. United States*, 255 U.S. 313 (1921); *Bumper v. North Carolina*, 391 U.S. 543 (1968).

The Arkansas Supreme Court gave no guidance in this case as to whether the language in the form signed by petitioner McIntosh approaches the level of implied coercion. Indeed, it did not even address petitioners' contention. The form, however, speaks for itself, and as stated, petitioners believe that the language used in the form does constitute implied coercion and vitiates any consent obtained through the use of the form.

Standard consent to search forms such as the one used in this case are used by law enforcement agencies all over the country. Addressing this issue will give the Court the opportunity to set a standard of implied coercion by which the language in this form, and other consent forms, can be judged.

IV.

THIS COURT SHOULD ADDRESS THE QUESTION, LEFT OPEN IN *GREER V. MILLER*, 107 S.CT. 3102 (1987), OF WHETHER A DEFENDANT'S FIFTH AMENDMENT RIGHT TO REMAIN SILENT IS VIOLATED UNDER *DOYLE V. OHIO*, 426 U.S. 610 (1976), WHEN THE JURY IS ALLOWED TO CONSIDER A STATE WITNESS' COMMENT BRINGING ATTENTION TO THE ACCUSED'S POST-ARREST SILENCE, EVEN THOUGH DE-

FENSE COUNSEL'S OBJECTION IS SUSTAINED.

In the trial of this case, during the direct examination of Trooper Dale Best, the following dialogue occurred:

> Q What about the other subjects?
>
> A They were all three seated in Sergeant Taylor's office after the individual interviews had been conducted, at which time I confronted him as to whether or not they had been in California, that we had received or obtained the motel receipts from the floor of the vehicle, and all three made no comment.

The trial court agreed that the testimony was improper, but held that a mistrial was not warranted. Defense counsel declined the court's offer to admonish the jury to disregard the testimony, reasoning that such an admonition would do nothing but create prejudice by calling more attention to the comment. Thus, the jury heard the comment and was allowed to consider petitioners' post-arrest silence for whatever purpose it chose.

The Arkansas Supreme Court also agreed that a mistrial was improper, relying upon *Greer v. Miller*, 107 S.Ct. 3102 (1987). *Greer* held that when such an

improper reference to a defendant's exercise of his Fifth Amendment right to remain silent is made, but is followed by proper and immediate curative action of the trial court including an explicit sustaining of defense counsel's objection and a specific explanation to the jury that it should disregard the question and answer, the defendant's right to a fair trial is not violated.

Greer, however, is not dispositive of the present case because defense counsel made a tactical decision not to allow any more attention to be drawn to the matter. *See Greer*, 107 S.Ct. at 3109 n. 8. In this case, the question is presented whether petitioners should be penalized based upon their defense counsel's tactical decision. It is not certain that had the steps taken in *Greer* been taken in this case, petitioners would not be entitled to a mistrial because the facts and circumstances of every case are different. Should defense counsel abandon his professional opinion simply because of the Court's holding in *Greer?* Addressing this issue will give the Court the opportunity to clarify whether *Greer* should be held applicable in every single case, and provide guidance on the question of whether due process is violated when a jury is permitted to use unadmonished, a violation of a defendant's Fifth Amendment right against the defendant in a criminal case when defense counsel has made a professional tactical decision, for good reason, not to request an admonishment.

CONCLUSION

The writ of certiorari should be granted.

JOHN WESLEY HALL, JR.*
AND CRAIG LAMBERT
523 West Third Street
Little Rock, Arkansas 72201
(501) 371-9131

Attorneys for Petitioners

*Counsel of Record

APPENDIX

Tommy McINTOSH, Charles Marvin Hayes, and Maurice Crawford *v.* STATE of Arkansas

CR 88-10

Supreme Court of Arkansas
Opinion delivered July 11, 1988

1. APPEAL & ERROR — FACTS — STATED IN LIGHT MOST FAVORABLE TO THE APPELLEE. — The practice on appellate review is to state the facts in a light most favorable to the appellee.

2. SEARCH & SEIZURE — CONSENT — THE STATE HAS THE BURDEN TO PROVE CONSENT WAS VOLUNTARILY GIVEN. — The state has the burden of proving by clear and positive testimony that consent to a search was freely and voluntarily given and that there was no actual or implied duress or coercion.
3. SEARCH & SEIZURE — CONSENT — STANDARD OF REVIEW. — The supreme court looks at the totality of the circumstances in determining whether a consent is voluntary.
4. SEARCH & SEIZURE — CONSENT — WHETHER A DEFENDANT KNEW HE HAD THE RIGHT TO REFUSE CONSENT IS A CONSIDERATION IN DETERMINING VOLUNTARINESS. — The trial court may take into consideration whether a defendant knew he had the right to refuse consent in determining voluntariness although it is not a conclusive factor; where the consent form contained a statement that the undersigned had been informed of his right to refuse to consent to any search and that he might revoke his consent at any time, considering the totality of the circumstances, the trial judge was not clearly wrong nor was the decision that the search was valid contrary to the law.
5. SEARCH & SEIZURE — AUTOMOBILES — DIMINISHED EXPECTATION OF PRIVACY. — Automobiles have a diminished expectation of privacy.
6. TRIAL — MISTRIAL — EXCEPTIONAL REMEDY TO BE USED ONLY WHERE PREJUDICE CANNOT BE REMOVED BY AN ADMONITION TO THE JURY. — Mistrial is an exceptional remedy to be used only where any possible prejudice cannot be removed by an admonition to the jury; where the trial judge offered to give an admonitory instruction to the jury, but the appellants refused the offer, the trial court did not err in denying a mistrial.
7. CRIMINAL LAW — DIRECTED VERDICT — THE MOTION IS A CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE. — A motion for a directed verdict is a challenge to the sufficiency of the evidence.
8. DRUGS & NARCOTICS — SUBSTANTIAL EVIDENCE — EVIDENCE SUPPORTING CONVICTIONS FOR POSSESSION OF A CONTROLLED SUBSTANCE WITH THE INTENT TO DELIVER. — Where the cocaine was found wrapped in tape inside a shopping bag which had fingerprints of the first appellant on it, where the other two appellants told the officer they had pistols in the van, where all three appellants initially denied being in California despite motel receipts in one of the latter two's name found in the van, where all three gave conflicting stories as to where they had been, but during the trial all three testified they had gone to California to vacation, shop and see some girls, and where the van was rented and driven to and from California in four days, the jury could conclude this journey was a

drug run which all three knew about, participated in and should be held accountable for, and there was substantial evidence to support the conviction of all three.

9. APPEAL & ERROR — ARGUMENTS RAISED FOR THE FIRST TIME ON APPEAL — INEFFECTIVE ASSISTANCE OF COUNSEL CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL. — Where the supreme court could make no conclusion from the record that the issue had been raised below, the issue of ineffective assistance of counsel could not be raised for the first time on appeal.

Appeal from Crawford Circuit Court; *Don Langston*, Judge; affirmed.

John Wesley Hall, Jr., for appellant.

Steve Clark, Att'y Gen., by: *J. Blake Hendrix*, Asst. Att'y Gen., for appellee.

DARRELL HICKMAN, Justice. The appellants, who were in a rented van, were stopped by a state trooper near Ozark, Arkansas, for speeding. The trooper became suspicious and asked them if he could search the van. The driver and one other agreed, and the trooper found two kilograms of cocaine worth approximately $250,000. The appellants were convicted of possession of a controlled substance with the intent to deliver. Maurice Crawford received 40 years in prison and a $100,000 fine; Charles Hayes received 40 years in prison and a $50,000 fine; and Tommy McIntosh received 50 years in prison and a $250,000 fine.

The main issue on appeal is whether the search of the van was based on the valid consent of two of the appellants. The trial judge ruled that the search was valid and upon examining the record, we agree. We also conclude there was substantial evidence to support the convictions of all three appellants. No error requiring reversal was committed when an officer testified that the appellants made no comment when asked whether they had been to California. We find no basis to address the question of ineffective assistance of counsel, which is raised for the first time on appeal.

[1] We state the facts in a light most favorable to the appellee which is the practice on appellate review. *Russell* v. *State*, 295 Ark. 619, ___ S.W.2d ___ (1988). A state trooper, David Hyden, clocked the appellants' van at 80 m.p.h. on the

interstate near Ozark, Arkansas, on February 8, 1987. He pulled the van over. The driver was Tommy McIntosh, who was asked to accompany the officer to the police car. Hyden noticed that the mileage on the van's odometer was approximately 5,000. McIntosh gave Hyden his driver's license and a rental agreement as evidence of registration which reflected that the van had been leased in Little Rock four days earlier and the mileage was 1,500 miles. Hyden asked McIntosh about the mileage, and McIntosh told him there must be some mistake because they had only driven to Oklahoma City to see some friends. Hyden testified that McIntosh was extremely nervous. Because of McIntosh's nervousness and the discrepancy in the mileage, Officer Hyden asked for permission to search the van. McIntosh agreed and signed a consent form. McIntosh pointed out that Crawford had actually rented the van and perhaps he should also consent. According to Hyden, Crawford was called to the police car and asked if he would consent to a search which he did. Hayes, who was in the back seat lying down, was not asked. During the search the officer found two kilograms of cocaine wrapped in light brown plastic tape in two separate packages. Eight thousand dollars in eight packets of $1,000 each, $29 in one dollar bills and two guns were found.

The appellants were taken to police headquarters and questioned further. They told conflicting stories about their visit to Oklahoma. A further search of the van produced receipts for merchandise purchased in California and motel receipts from California.

At the trial the appellants all testified that they had taken a four day vacation to California. McIntosh said one of the reasons for the trip was to purchase a certain type of tennis shoe which was not available locally. They also said they planned to do some shopping and see some girls.

[2-4] We address the search question first. The appellants argue that the consent of both McIntosh and Crawford was invalid, first because it was either expressly or impliedly coerced, and second because it was not based on a reasonable suspicion. We have held that "[t]he state has the burden of proving by clear and positive testimony that consent to a search was freely and voluntarily given and that there was no actual or implied duress or

coercion." *Scroggins* v. *State*, 268 Ark. 261, 595 S.W.2d 219 (1980). We look at the totality of the circumstances in determining whether a consent is voluntary. *Schneckloth* v. *Bustamonte*, 412 U.S. 217 (1973). There were no coercive circumstances present, express or implied, in this case. A single officer asked the driver and the person listed on the rental agreement as the driver to consent and they readily did so. The court may also take into consideration whether a defendant knew he had the right to refuse consent in determining voluntariness although it is not a conclusive factor. *Schneckloth* v. *Bustamonte, supra*. In the present case the consent form contained the statement, "I have been informed by the above named State Police that I may refuse to consent to any search and that I may revoke my consent at any time." Considering the totality of the circumstances, we cannot say the trial judge was clearly wrong nor was the decision contrary to the law.

[5] The appellants argue that the consent was not valid because it was not based on reasonable suspicion that there was contraband or the presence of criminal evidence. The appellants rely on language in *Garrett* v. *Goodwin*, 569 F. Supp. 106 (E.D. Ark. 1982), and a proposed opinion issued by a federal magistrate to the local district federal court. The *Garrett* case is limited to roadblocks conducted by the Arkansas State Police and for obvious reasons, we would never use a proposed order as precedent. More importantly, the appellants' argument has never been declared to be the law by the United States Supreme Court. Under existing law, this search was valid. Automobiles have a diminished expectation of privacy. *United States* v. *Chadwick*, 433 U.S. 1 (1977). The initial stop, which is always critical in search cases, was legal for a speeding violation. *See Russell* v. *State, supra*. The trial judge held the consent to search was valid and voluntarily given.

In *Schneckloth* v. *Bustamonte, supra*, the United States Supreme Court observed:

> The circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning. The police may seek to investigate further suspicious circumstances or to follow up leads developed in questioning persons at the scene of a

crime.

Several other peripheral arguments are made regarding the search, but we conclude that the trial court's decision on this issue was not wrong.

The appellants argue that the trial court erred in denying a mistrial when a police officer, testifying, commented on the appellants' failure to answer a question. Officer Best testified as follows:

> Q. Now, he (Crawford) told you that he had not been to California. Did you show him some of the California receipts, that the jury's seen, or ask him about them?
>
> A. Not during the interview.
>
> Q. Okay.
>
> A. Not at this particular time.
>
> Q. What about the other subjects?
>
> A. They were all seated in Sergeant Taylor's office after the individual interviews had been conducted, at which time I confronted him as to whether or not they had been in California, that we had received or obtained the motel receipts from the floor of the vehicle, and all three made no comment.

An immediate objection was made by the appellants' attorney and the following discussion took place during a side bar conference:

> Mr. Massie: Your honor, it's one thing if they're talking about—if they're talking about a statement that they made. It's another thing if they exercise any right not to comment. Now, I think that was improper, as such, and I ask the court for a mistrial and also, in furtherance, that we not give them thing where they exercised their rights in not making any comment, because they're exercising their right to remain silent. In terms of he's saying they made no comment is one thing that they said, something in response to.
>
> The Court: I don't think it's grounds for a mistrial. I will

instruct the jury that the testimony —

Mr. Massie: I don't think the court needs to call that attention to it, but I ask that the court acknowledge the prosecutor not to elicit anything in terms of their response to in the future; otherwise, I think a request for a mistrial, if it is done a second time, ought to be granted, once the prosecutor is put on notice of that particular matter.

Mr. Fields: I think the Defense's request is reasonable and I will not get into that.

The Court: All right, sir.

In a recent United States Supreme Court case, *Greer* v. *Miller*, ___ U.S. ___, 107 S. Ct. 3102 (1987), a similar situation arose. The prosecutor asked the appellant when he testified, "Why didn't you tell this story to anybody when you got arrested?" An immediate objection and motion for mistrial was made. The trial judge stopped further inquiry but denied the mistrial. The error in the present case is even less apparent than the one made in *Greer*. Here it was not the prosecutor who referred to the appellants' silence but a police officer who gave an unsolicited response. The trial judge did not allow nor did the prosecutor attempt to use the appellants' silence for impeachment purposes or call attention to their silence. *See Doyle* v. *Ohio*, 426 U.S. 610 (1976).

[6] We have held that a "mistrial is an exceptional remedy to be used only where any possible prejudice cannot be removed by an admonition to the jury." *Free* v. *State*, 293 Ark. 65, 732 S.W.2d 452 (1987). Although the trial judge offered to give an admonitory instruction to the jury, the appellants refused the offer. This case is somewhat similar to *Wheat* v. *State*, 295 Ark. 178, 747 S.W.2d 112 (1988), where the trial court refused a mistrial when a police officer, in explaining a photographic lineup, spoke of "mugshots" being pulled from the police files. In *Wheat* the appellant also failed to ask for an admonition. We cannot say the trial court was wrong in this case to deny a mistrial. *See Greer* v. *Miller*, *supra*.

[7] It is argued that the trial court was wrong in denying motions for a directed verdict on behalf of McIntosh and Hayes since there was no substantial evidence to support their convic-

tions. A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Glick* v. *State*, 275 Ark. 34, 627 S.W.2d 14 (1982).

[8] The cocaine was found wrapped in tape inside a shopping bag which had Crawford's fingerprints on it. Both Hayes and McIntosh told the officer that they had pistols in the van. (The two guns were not illegal weapons.) All three appellants denied being in California. However, Officer Best found motel receipts in the van from a motel in Monrovia, California. They were in Hayes' name. All three appellants gave the officers conflicting stories as to where they had been. Officer Hyden testified that McIntosh told him that he had been to Oklahoma City to see some friends; Officer Best testified that Hayes told him they had been to Ardmore, Oklahoma, to visit his girlfriend, but he was unable to give the police her address or phone number; Best also testified that Crawford told him they had gone to Oklahoma to attend a funeral, but he could not tell him the person's name or where the funeral had been held. During the trial all three testified that they had gone to California to vacation. shop, and see some girls. The van was rented on February 4, 1987, and driven to California and back by February 8, 1987. The jury could conclude this journey was not what the appellants contended, a shopping trip to California, but rather simply a drug run which all three knew about, participated in and should be held accountable for.

[9] The appellants raise the issue of ineffective assistance of counsel for the first time on appeal, contending that their attorney had an obvious conflict of interest in representing all three. It is argued that we can conclude this fact from the record without the issue being raised below. The appellants cite *Glasser* v. *United States*, 315 U.S. 60 (1941), and *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), as authority. However, in both *Glasser* and *Holloway* the issue was raised below. We can make no such conclusion from the record, and we have held that ineffective assistance of counsel cannot be raised for the first time on appeal.

Affirmed.

Petition for Rehearing is denied. September 12, 1988.

Appellants' motion to recall mandate is denied. Purtle, J., would grant. October 17, 1988.